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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 94 MISC.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOHN JABLONWSKI,

Petitioner,

against

J. VERNAL JACKSON, Warden of Clinton Prison, at Dannemora, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause, by the Attorney-General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review an order of the Court of Appeals of the State of New York dated July 2, 1947 (R. 32) denying leave to appeal to that court, upon one typewritten record copy, from an order of the Supreme Court of the State of New York, Appellate

Division, Third Judicial Department, entered in the office of the clerk thereof in accordance with a decision handed down May 16, 1947 (R. 31), unanimously affirming an order of the Supreme Court of the State of New York entered in the office of the clerk of Clinton County on February 3, 1947 (R. 29) dismissing the petitioner's writ of habeas corpus and remanding him to the custody of respondent as warden of Clinton Prison, Dannemora, New York. The order of the Court of Appeals denied petitioner's application for permission to prosecute his appeal "as a poor person upon one typewritten copy of the Appellate Division record, to dispense with the printing of the record on appeal and for assignment of counsel" (R. 32).

Facts

Jablonwski was indicted by the Grand Jury of Albany County for the crime of robbery, first degree, as a second offender (R. 24) on October 17, 1941. He pleaded guilty to the crime of robbery, third degree, committed as a second offender, and was sentenced to serve in prison not less than 10 years nor more than 20 years.

The Issues

Petitioner attacks the legality of his sentence on the ground that no information was filed against him charging him with a previous conviction as provided by N. Y. Penal Law § 1943. We argue that petitioner has not exhausted his remedies in the courts of the State of New York, that this is not a proper case for the application of certiorari and that no constitutional question was decided by the New York Courts.

POINT I

Petitioner did not exhaust his remedies in the State Courts and there has been no decision on the merits by the highest Court of the State in which a decision could be had.

The Constitution of the State of New York (Art. VI, § 7), defining the jurisdiction of the Court of Appeals, provides:

> "Appeals may be taken to the court of Appeals in the classes of cases enumerated in this section. * * *.
> In civil cases and proceedings as follows:
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification."

If the petitioner is correct in his contention that the case presents a question under the Constitution of the United States, he was entitled to appeal to the Court of Appeals as of right. He did not avail himself of that right and there has been no decision by the Court of Appeals upon that constitutional question.

Section 589 of the Civil Practice Act of New York authorizes appeals to the Court of Appeals by permission of the Appellate Division or by permission of the Court of Appeals, but only from an order or judgment which is not appealable as a matter of right.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judg-

ment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y., Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case, no appeal has been taken to the Court of Appeals, which merely denied as a matter of discretion a motion to vary its rules to permit an appeal to be taken upon typewritten record instead of a printed record, and for the assignment of counsel.

POINT II

The case presents no Federal question.

The jurisdiction of this court with regard to the construction of penal statutes of the state was declared in the case of *Rawlins* v. *Georgia* (1906), 201 U. S. 638, 639-40, wherein Mr. Justice Holmes pointed out that, "If the State Constitution and the laws as construed by the state court are consistent with the 14th amendment, we can go no further." (see also *Stirling* v. *Constantin* [1932], 287 U. S. 387, 396; *Town of South Ottowa* v. *Perkins* [1878], 94 U. S. 260, 268; *Post* v. *Supervisor* [1881], 105 U. S. 667, 668). In his petition, the petitioner claims that his sentence violated the provisions of N. Y. Penal Law § 1941-1943; and he seeks a review thereof by this court. The New York statutes and

practice specifically authorize either of two methods in dealing with a second offender. He may either be indicted, as was the petitioner, as a second offender; or the indictment may contain no reference to his previous conviction but after conviction an information may be filed by the district attorney, charging the previous conviction. If the accused pleads guilty to the indictment as a second offender he may be so sentenced, or if he is found to be the same person mentioned in the information be likewise sentenced as a second offender. The practice and procedure is in the alternative and optional with the district attorney, although it may be said that the preferable practice, if the fact of the previous conviction is known to the district attorney, was that adopted in this instance, *i. e.,* indicting the accused as a second offender, thus apprising him at the very outset that he will be so proceeded against and ultimately so sentenced if found guilty. Concerning this alternative practice, the New York Courts have specifically passed upon the contention of the petitioner and have held that no right of the petitioner was violated. This holding was in accordance with the established rule in New York that either procedure may be adopted at the option of the district attorney *(People* v. *Gowaski,* 244 N. Y. 451) Mr. Justice Hughes of this court in *Graham* v. *West Virginia* (1911), 224 U. S. 616, 620 said (P. 626):

> "If a State adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. Otherwise, criminals who change their place of operation and successfully conceal their identity would be punished simply as first offenders, although on entering prison they would immediately be recognized as former convicts. It is to prevent such a frustration of its policy that provision is made for alternative methods; either by alleging the fact of prior conviction in

> the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. *Plumbly* v. *Commonwealth*, 2 Met. 413, 415, per Shaw, C. J. In the latter proceeding, as well as in the former, the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected."

In that case the plaintiff in error argued that he was deprived of certain rights because an information was filed against him according to the statute of West Virginia, which statute is similar to the New York statute. In this instance the petitioner claims that he was deprived of certain rights because such an information was not so filed against him. The petitioner would seem to argue that anyone sentenced under the "common law" procedure was improperly sentenced.

Conclusion

It is thought that (1) the case presents no federal question, (2) this cause presents no question warranting review by this court and (3) the petition should be denied.

Dated: September 12, 1947.

Respectfully submitted,

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CERTIORARI

DENIED